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## ADAM SMITH'S FIRST AMENDMENT

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Until recently, Washington, D.C., maintained what most would regard as a perfectly ordinary licensing scheme for tour guides. In 2014, the D.C. Circuit declared the scheme unconstitutional under the First Amendment in a remarkable case entitled *Edwards v. District of Columbia*.<sup>1</sup> The court announced that the District's regulations must be reviewed under intermediate scrutiny because they burden speech; the regulations made it "illegal to talk about points of interest or the history of the city while escorting or guiding a person who paid you to do so" without first obtaining a license.<sup>2</sup> Licenses were awarded to those who passed a test and paid a \$200 registration fee.<sup>3</sup>

After a rather scathing review, the court concluded that the regulations failed directly to advance the government's interest in protecting D.C. tourism from dishonest or unsatisfactory tour guides.<sup>4</sup> It found that the private market — operating through rating sites like Yelp and TripAdvisor — was instead sufficient to turn "the coal of self-interest" into "a gem-like consumer experience,"<sup>5</sup> thereby rendering the District's scheme superfluous. In so holding, the court reminded the District that the "seminal work" of the "celebrated economist and philosopher" Adam Smith had long ago "captured the essence of this timeless principle: 'It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest.'"<sup>6</sup>

The court's reasoning is startling. Until very recently, it was well accepted that purely economic regulations are subject to rational basis review. This was the point of consigning *Lochner v. New York*<sup>7</sup> to the anticanon.<sup>8</sup> Since the New Deal, black-letter constitutional law has authorized the Nation to regulate the complexities of modern economic

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<sup>1</sup> 755 F.3d 996 (D.C. Cir. 2014).

<sup>2</sup> *Id.* at 998; *see also id.* at 1001–02.

<sup>3</sup> *Id.* at 998.

<sup>4</sup> *Id.* at 1006. By contrast, the Fifth Circuit recently concluded that New Orleans's similar tour guide licensing scheme withstood First Amendment challenge. *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), *cert. denied*, No. 14-585, 2015 WL 731879 (Feb. 23, 2015). *See also Edwards*, 755 F.3d at 1009 n.15.

<sup>5</sup> *Edwards*, 755 F.3d at 1007.

<sup>6</sup> *Id.* (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 12 (Digireads.com Publishing 2004) (1776)).

<sup>7</sup> 198 U.S. 45 (1905).

<sup>8</sup> *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

life in ways designed to modify the unobstructed operation of the private market. As Justice Frankfurter put it in 1949, *Lochner*, and the substantive due process it embodied, idolized:

[T]he shibboleths of a pre-machine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of "liberty" were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of the perduring reach of the Constitution led to Mr. Justice Holmes' famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer's Social Statics.<sup>9</sup>

*Edwards* is written as if that history never occurred. *Edwards* holds that regulations burdening speech in the marketplace must convincingly demonstrate their necessity before they can interfere with the unassisted operation of the market.<sup>10</sup> *Edwards* puts the constitutional burden of justifying regulations of marketplace speech squarely and onerously on the state.<sup>11</sup> Because almost all commercial activity proceeds through the medium of communication, *Edwards* effectively re-vives *Lochnerian* substantive due process.

How could the First Amendment *constitutionalize* the unregulated operation of the laissez-faire commercial marketplace? How could the First Amendment require the political branches to adopt the theories of an eighteenth-century philosopher, even if, after due democratic deliberation, "We the people" have decided to reject them? We have always celebrated the First Amendment as "the guardian of our democracy."<sup>12</sup> Yet now, in the hands of the D.C. Circuit, the First Amendment seems to have been transformed into a straitjacket for our institutions of democratic governance.

Unfortunately, the D.C. Circuit is not alone. Across the country, plaintiffs are using the First Amendment to challenge commercial reg-

<sup>9</sup> *AFL v. Am. Sash & Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring) (footnote omitted).

<sup>10</sup> "Perhaps most fundamentally, what evidence suggests market forces are an inadequate defense to seedy, slothful tour guides? To state the obvious, [the plaintiff] Segs in the City, like any other company, already has strong incentives to provide a quality consumer experience — namely, the desire to stay in business and maximize a return on its capital investment." *Edwards*, 755 F.3d at 1006.

<sup>11</sup> *Id.* at 1003–07.

<sup>12</sup> *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

ulations, in matters ranging from public health to data privacy.<sup>13</sup> It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable. The Supreme Court itself recently and provocatively proclaimed that although “[t]he Constitution ‘does not enact Mr. Herbert Spencer’s Social Statics[,]’ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting),” it nevertheless “does enact the First Amendment.”<sup>14</sup>

## I. COMMERCIAL SPEECH DOCTRINE

Without question, the driving force behind this striking turn in our constitutional order has been the recent and aggressive expansion of commercial speech doctrine. Until the 1970s, the First Amendment did not apply to commercial speech at all.<sup>15</sup> In 1942, the Court explicitly placed commercial speech beyond the ambit of the First Amendment.<sup>16</sup> But in 1976, in the watershed decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>17</sup> the Court

<sup>13</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir.), *reh’g granted*, No. 13-5252 (D.C. Cir. Nov. 18, 2014); *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291 (4th Cir. 2013); *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012); *CTIA—Wireless Ass’n v. City & Cnty. of San Francisco*, 494 F. App’x 752 (9th Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403 (D.C. Cir. 2012); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628 (6th Cir. 2010); *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007); *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005); *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 14 F.3d 429 (9th Cir. 1993).

<sup>14</sup> *Sorrell*, 131 S. Ct. at 2665 (parallel citations omitted). The language comes largely from Justice Thomas’s dissent in an earlier commercial speech case, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 505–06 n.3 (1997) (Thomas, J., dissenting).

<sup>15</sup> See *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>16</sup> *Id.* at 54 (“This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”).

<sup>17</sup> 425 U.S. 748 (1976).

overruled its precedent and created modern commercial speech doctrine.<sup>18</sup> The case held that the state of Virginia could not prohibit pharmacists from advertising drug prices.

At first, constitutional protection for commercial speech was supported by progressive jurists who were anxious to break information monopolies, particularly in the medical and legal professions.<sup>19</sup> Conservatives on the Court vigorously objected to this expansion of First Amendment rights. Justice Rehnquist expressed concern over the “far reaching” consequences of “elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas.”<sup>20</sup> He observed that “there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”<sup>21</sup> Justice Rehnquist regarded pharmacists as no “less engaged in a regulatable profession than were the opticians in *Williamson [v. Lee Optical Co.]*, 348 U.S. 483 (1955).”<sup>22</sup> He warned in 1980 that commercial speech doctrine could lead to a return:

[T]o the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia v. New York*: “[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .”<sup>23</sup>

During the 1990s, however, the political valence of commercial speech doctrine shifted radically. Conservatives on the Court began to appreciate its potential as a deregulatory tool. In 1995, Chief Justice Rehnquist joined an opinion by Justice Thomas invalidating a statute

<sup>18</sup> See *id.* at 760.

<sup>19</sup> See, e.g., *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Ohrlik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. 748; see also *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>20</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting).

<sup>21</sup> *Id.* at 784.

<sup>22</sup> *Id.* at 785.

<sup>23</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (alterations in original) (citations omitted) (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)).

prohibiting beer labels from displaying alcohol content.<sup>24</sup> In more recent years, conservative Justices have been leading the charge to use commercial speech doctrine to strike down economic regulation.<sup>25</sup>

The deregulatory potential of constitutional protection for commercial speech did not go unnoticed by the Court that had originally established the doctrine. The Court sought to avoid that potential by stressing that “commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,” and is subject to “modes of regulation that might be impermissible in the realm of noncommercial expression.”<sup>26</sup> The Court held that neither overbreadth nor prior restraint doctrines apply to commercial speech.<sup>27</sup> It concluded that chilling-effect doctrine likewise did not apply to commercial speech<sup>28</sup> and affirmed that content discrimination is permissible with regard to commercial speech

<sup>24</sup> See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

<sup>25</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor, comprising the majority, with Justice Breyer, joined by Justices Ginsburg and Kagan, in dissent); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (Justice O’Connor, joined by Justices Scalia, Kennedy, Souter, and Thomas, comprising the majority, with Justice Breyer, joined by Chief Justice Rehnquist and Justices Stevens and Ginsburg, in dissent); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas forming majority to invalidate regulations governing certain outdoor advertising of smokeless tobacco and cigars, and the same group plus Justice Souter to void the regulations prohibiting certain indoor point-of-sale advertising of those products); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (Justice Kennedy, joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, and Thomas forming a majority, with Justices Stevens and Thomas also concurring, to invalidate compelled subsidization of mushroom advertising over the dissent of Justice Breyer joined by Justices O’Connor and Ginsburg).

Justice Thomas has penned powerful separate opinions arguing that commercial speech ought to receive the same constitutional protections as political speech, see *Lorillard Tobacco*, 533 U.S. at 572–90 (Thomas, J., concurring in part and concurring in the judgment); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 504–06 (1997) (Thomas, J., dissenting); 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring in part and concurring in the judgment), and Justices Kennedy and Scalia have questioned whether the commercial speech doctrine’s core precedents should be retained, see *Lorillard Tobacco*, 533 U.S. at 571–72 (Kennedy, J., concurring in part and concurring in the judgment); 44 *Liquormart*, 517 U.S. at 517–18 (Scalia, J., concurring in part and concurring in the judgment).

<sup>26</sup> *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)). Contrary to Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 191–92 (2015), we do not understand *United States v. Stevens*, 130 S. Ct. 1577 (2010), to overrule this foundational premise of commercial speech doctrine. That is why courts analyzing regulations of commercial speech apply the “intermediate scrutiny” of *Central Hudson*.

<sup>27</sup> *Cent. Hudson*, 447 U.S. at 565 n.8; see also *id.* at 571 n.13; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 n.24 (1976); Robert Post, Lecture, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 28–33 (2000). Notice the relevance of this reasoning to Sherman’s insistence on a constitutional distinction between the punishment of speech “after it causes harm” and “prophylactically” banning or licensing speech. Sherman, *supra* note 26, at 196.

<sup>28</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

because “[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.”<sup>29</sup> It reasoned that commercial speakers can be compelled to disclose factual information so long as the disclosures are “reasonably related” to an appropriate state interest.<sup>30</sup>

Commercial speech doctrine was invented with the clear understanding that the state would be freer to regulate in the domain of commercial speech than it was “in the realm of noncommercial expression.”<sup>31</sup> This difference was justified on the ground that commercial speech was “constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’”<sup>32</sup> In the canonical case *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>33</sup> the Court was explicit that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”<sup>34</sup> The constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions.<sup>35</sup>

Ordinary First Amendment doctrine, by contrast, focuses on the rights of *speakers*, not listeners. It protects the right of persons to engage in the formation of “that public opinion which is the final source of government in a democratic state.”<sup>36</sup> Ordinary First Amendment doctrine protects the right to participate in “public discourse,”<sup>37</sup> which is to say in the modes of communication constitutionally deemed necessary to form public opinion.<sup>38</sup> This is why the First Amendment has

<sup>29</sup> *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (alterations in original) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72) (internal quotation marks omitted).

<sup>30</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>31</sup> *Ohralik*, 436 U.S. at 456.

<sup>32</sup> *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 764).

<sup>33</sup> 447 U.S. 557 (1980).

<sup>34</sup> *Id.* at 563; *see also, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (“Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.” (citations omitted)).

<sup>35</sup> One of us has previously labeled this value “democratic competence,” which refers to the cognitive empowerment of those who participate in public discourse. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 27–60 (2012).

<sup>36</sup> *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.) (L. Hand, J.), *rev’d*, 246 F. 24 (2d Cir. 1917).

<sup>37</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>38</sup> *See* ROBERT C. POST, *CITIZENS DIVIDED* 3–43 (2014).

from the very beginning been characterized as essential to our democracy.<sup>39</sup> In one of its very first decisions upholding a First Amendment right, the Court proclaimed that “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”<sup>40</sup>

Ordinary First Amendment doctrine does not protect speakers’ rights merely in order to safeguard an “informational function.” We have the right to speak because we are entitled to engage in the great process of democratic self-determination, even if what we say is deliberately false.<sup>41</sup> The First Amendment defends the prerogative of each of us to participate in the formation of public opinion in a manner of our own choosing. It does so because we can imagine public opinion responding to our views only if we are free to speak as we please.<sup>42</sup> As the Court recently proclaimed in *Citizens United v. Federal Election Commission*,<sup>43</sup> “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>44</sup>

This kind of responsive democracy is in serious tension with conscripting the First Amendment to shield the undisturbed operation of the laissez faire market. Alexander Meiklejohn observed long ago that in a democracy “the governors and the governed are not two distinct groups of persons. There is only one group — the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own masters, our own subjects.”<sup>45</sup>

When we engage in public discourse, the First Amendment accords us the privileges of “rulers” who exercise the prerogatives of self-determination. We are given the freedom and autonomy to speak as

<sup>39</sup> See, e.g., *Gilbert v. Minnesota*, 254 U.S. 325, 337–38 (1920) (Brandeis, J., dissenting).

<sup>40</sup> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>41</sup> See *United States v. Alvarez*, 132 S. Ct. 2537 (2012). Does Sherman mean to contend that those who engage in “occupational speech,” like lawyers and doctors, have an equivalent right to engage in deliberately false speech? Compare 281 *Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) (striking down a state statute that criminalized the communication of false statements about proposed ballot initiatives if made knowingly or with reckless disregard for the truth), with *Hughes v. Malone*, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978) (holding that “[a]lthough an attorney is not an insurer of the results sought to be obtained by such representation, when, after undertaking to accomplish a specific result, he then wilfully [sic] or negligently fails to apply commonly known and accepted legal principles and procedures through ignorance of basic, well-established and unambiguous principles of law or through a failure to act reasonably to protect his client’s interests, then he has breached his duty toward the client”).

<sup>42</sup> One of us has called this constitutional value “democratic legitimation.” POST, *supra* note 35, at 1–25.

<sup>43</sup> 130 S. Ct. 876 (2010).

<sup>44</sup> *Id.* at 898. Contrary to Sherman, *supra* note 26, at 196–97, we do not understand recent cases to have abandoned the democratic explanation for First Amendment doctrine.

<sup>45</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 12 (1960).

we will. But when we engage in commercial speech, we are not participating in democratic self-determination; we are instead transacting business in the marketplace. We are accordingly communicating as “subjects” who are “ruled.”<sup>46</sup> If we were to attribute the prerogatives of autonomy appropriate for self-governance to commercial speech, we could never govern ourselves at all. If the speech of “subjects” were confused with that of “rulers,” the First Amendment would simultaneously authorize democratic deliberation and render powerless the government produced by that deliberation.

The Court formulated commercial speech doctrine precisely to avoid this paradox. It explicitly characterized commercial speech as constitutionally valuable *only* because of its “informational function.” It explicitly created commercial speech doctrine to protect the rights of *listeners* rather than the autonomy of *speakers*. This conceptual architecture has fundamental constitutional implications.

It means, for example, that the state can regulate commercial speech using laws that discriminate on the basis of content. Because “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”<sup>47</sup> Although the state cannot suppress misleading or deceptive speech in the political sphere, there is a “vast regulatory apparatus in both the federal government and the states . . . to control . . . potentially misleading or deceptive speech.”<sup>48</sup>

It also means that the state can generally compel commercial speech.<sup>49</sup> Because First Amendment protections of public discourse

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<sup>46</sup> We do not mean to suggest that the First Amendment does not extend any protection to commercial speech. We instead take a pluralistic view of the First Amendment. Our point is simply that if commercial speech is accorded the same protections as public discourse, democratic governance will not be possible.

<sup>47</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980); *see id.* at 564 n.6 (“In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’”) (citations omitted).

<sup>48</sup> Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 153. Contrary to Sherman, *supra* note 26, at 200, we do not understand the contemporary Court to have abandoned the proposition that the state can regulate misleading commercial speech. No one contends, however, that the state can set up the equivalent of an FTC to suppress “misleading” political speech. It follows that, contrary to Sherman’s contention, there is no rule against content discrimination that is applicable to all speech.

<sup>49</sup> *See* Robert Post, Lecture, *Compelled Commercial Speech*, 117 W. VA. L. REV. (forthcoming 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504180) [<http://perma.cc/B5EV-6TG5>].



safeguard the autonomy of persons to govern themselves, they incorporate the principle that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”<sup>50</sup> Compelling commercial speakers to disclose factual information, by contrast, may *augment* the flow of information to listeners and hence enhance the “informational function” that justifies commercial speech doctrine. For this reason, compelled disclosures of commercial speech are constitutionally permissible so long as they are factual and “reasonably related” to an appropriate state interest.<sup>51</sup>

## II. FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL SPEECH

Judicial review of regulations that constrain commercial speech should be focused primarily on the question of whether they unduly restrict the flow of reliable information to the public. Contemporary courts appear to be losing sight of this basic point. Beguiled by the abstract generalities of the *Central Hudson* test,<sup>52</sup> judges have become captivated by the generic idea of “intermediate scrutiny”<sup>53</sup> rather than by the specific question of whether government regulations of commercial speech unduly impair public access to accurate information.

Courts applying *Central Hudson* ask whether government restrictions directly advance a substantial government interest and are “not more extensive than is necessary to serve that interest.”<sup>54</sup> Although this test imposes a potentially serious burden of justification

<sup>50</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *see also* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Barnette*, 319 U.S. 624.

<sup>51</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985). For an extended discussion, see Post, *supra* note 49.

<sup>52</sup> The authoritative test for restrictions on commercial speech was set forth in *Central Hudson*:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The elements of this test are markedly abstracted from the fundamental question of whether the circulation of information has been unduly impaired. See Post, *supra* note 27, at 53–54.

<sup>53</sup> See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 261 (2d Cir. 2014); *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 297 (4th Cir. 2013).

<sup>54</sup> E.g., *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004) (quoting *Central Hudson*, 447 U.S. at 566) (internal quotation mark omitted); *see supra* note 52.

upon the state, it is essentially peripheral to the fundamental question of whether the state has impaired the public circulation of information. Unless courts keep this question clearly in mind, they are liable to become lost.

First Amendment doctrine must be carefully crafted to protect First Amendment values. If the relevant constitutional value is the circulation of information, courts ought to employ doctrine that focuses precisely on this issue. Otherwise constitutional review simply drifts and becomes aimlessly intrusive and confused. This is what occurred, for example, in *Nordyke v. Santa Clara County*,<sup>55</sup> where the Ninth Circuit used commercial speech doctrine to strike down Santa Clara County's attempt to prohibit gun sales at its fairgrounds. Conceding that "the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment,"<sup>56</sup> the Ninth Circuit nevertheless held that prohibiting the offer of firearms or ammunition for sale was a regulation of commercial speech that must be subject to *Central Hudson* review.<sup>57</sup> *Nordyke* never bothered to ask whether the County's prohibition restricted the flow of useful information to the public.

It is true, as Paul Sherman suggests in his companion Commentary, that courts seem to be drifting into expanded protections for commercial speech. But it is false to assert that courts have abandoned the essential distinction between commercial speech and public discourse. Sherman is simply wrong to suggest otherwise. The extent of his error can be measured in the difference between "intermediate scrutiny" and the "strict scrutiny" for which he contends.

### III. *EDWARDS V. DISTRICT OF COLUMBIA*

As a matter of technical First Amendment doctrine, *Edwards* does not classify itself as a commercial speech case. It does not apply the *Central Hudson* test. It instead employs an eccentric form of "intermediate scrutiny" fashioned by cobbling together elements of the *O'Brien* test<sup>58</sup> with criteria developed in the context of content-neutral

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<sup>55</sup> 110 F.3d 707 (9th Cir. 1997).

<sup>56</sup> *Id.* at 710.

<sup>57</sup> *Id.* at 710–13. In its lease with the Santa Clara County Fairgrounds Management Corporation, the County had inserted an addendum providing:

It is the intention of the Board only to prohibit any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds. This prohibition applies to any act initiating any of the foregoing transactions with the intent of completing them at a later date.

It is not the intention of the Board to prohibit the exchange of information or ideas about guns, gun safety, or the display of guns for historical or educational purposes.  
*Id.* at 708–09.

<sup>58</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

“time, place and manner” regulations.<sup>59</sup> In the end, however, *Edwards* summarizes its doctrinal innovation as requiring the District of Columbia to demonstrate that its licensing requirements are “narrowly tailored to further a substantial government interest.”<sup>60</sup> For all intents and purposes, *Edwards* applies a test that is indistinguishable from *Central Hudson*.

It is fascinating that *Edwards* characterizes its review as a form of “intermediate” scrutiny. The licensing examination administered by the District of Columbia distinguishes between right and wrong answers. It therefore obviously and patently discriminates on the basis of content. The Supreme Court long ago declared that “the most exacting scrutiny” should be applied “to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”<sup>61</sup>

It does not take much legal imagination to anticipate how a court would treat a law permitting a pamphleteer to distribute a political leaflet only if she could first pass a government-administered test. No court would apply anything other than the strictest and most conclusive scrutiny.<sup>62</sup> Although *Edwards* states that it need not employ strict scrutiny because the District’s licensing scheme fails even “intermedi-

<sup>59</sup> The *Edwards* court stated that the D.C. licensing schemes should be:

[S]ubject to intermediate scrutiny. Under this standard, a government regulation is constitutional if (1) “it is within the constitutional power of the Government”; (2) “it furthers an important or substantial governmental interest”; (3) “the governmental interest is unrelated to the suppression of free expression”; (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,” *United States v. O’Brien*, 391 U.S. 367, 377 (1968); and (5) the regulation leaves open ample alternative channels for communication, see *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The failure to satisfy any prong of the test invalidates the regulation. *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990).

755 F.3d 996, 1001–02 (D.C. Cir. 2014).

On the relationship between the *O’Brien* test and “time, place and manner” requirements, see Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1263–64 (1995). There is reason to think that the Court that invented the *O’Brien* test would have been shocked by its characterization as “intermediate scrutiny.” See John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). The Court created the *O’Brien* test to brush aside First Amendment challenges to speech that was not public discourse and that the Court believed should be regulated as conduct. Similarly, the Court created doctrinal tests for “time, place and manner” regulations in order to find a way to easily hold them constitutional. See Post, *supra*, at 1260–65.

<sup>60</sup> 755 F.3d at 1002.

<sup>61</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

<sup>62</sup> The court assumed, “arguendo, the validity of the District’s argument that the regulations are content-neutral and place only incidental burdens on speech” and so applied intermediate scrutiny. *Edwards*, 755 F.3d at 1001. Such an assumption, even in the face of a party’s argument to the contrary, would be unthinkable were the government to impose licensing requirements on political speech.

ate” scrutiny,<sup>63</sup> no court would bother with such indirection with regard to a statute seeking to license political leaflets. So why does *Edwards* nonetheless apply only intermediate scrutiny?

Evidently the court in *Edwards* is aware that there is a constitutionally significant difference between political leaflets and the speech of professional tour guides. We regard political pamphlets as public discourse, and so we jealously protect the autonomy of persons to leaflet as they think best. But we do not normally understand professional tour guides as participating in public discourse, because we do not regard their speech as an attempt to influence the content of public opinion.

We might perhaps sharpen this distinction with an example. Imagine if the Tea Party were to offer “Tea Party guides to Washington geography.” The point of the guides would be to use sightseeing as a medium to convey the Party’s interpretation of our national history and political values. Even if the Tea Party were to charge for its tours, most courts would nevertheless categorize the tours as public discourse. Courts would regard the tours as efforts to shape the content of public opinion.

If the District were to attempt to apply its licensing regime to the Tea Party tours, any court would immediately apply strict scrutiny. By contrast, *Edwards* did not use strict scrutiny to evaluate a licensing regime applicable to professional tour guides. What accounts for this difference? We suggest it is because the court in *Edwards* implicitly understood that professional tour companies were simple commercial enterprises offering a product for sale.

It is true that professional tour guides sell a particular kind of product — information. In *Sorrell v. IMS Health Inc.*,<sup>64</sup> the Supreme Court used commercial speech doctrine to assess the constitutionality of state controls over information.<sup>65</sup> Lower courts have also used commercial speech doctrine to assess state regulations of information transmission.<sup>66</sup> This is because such controls impinge on the same constitutional value as that protected by commercial speech doctrine:

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<sup>63</sup> *Id.* at 1000 (“We need not determine whether strict scrutiny applies, however, because assuming the regulations are content-neutral, we hold they fail even under the more lenient standard of intermediate scrutiny.”).

<sup>64</sup> 131 S. Ct. 2653 (2011).

<sup>65</sup> *See id.* at 2667–68.

<sup>66</sup> *See, e.g.,* Nat’l Cable & Telecomms. Ass’n v. FCC, 555 F.3d 996 (D.C. Cir. 2009) (applying commercial speech doctrine to regulation requiring carriers to obtain opt-in consent before using, disclosing, or allowing access to customer information); *Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002) (analyzing regulations of the dissemination of consumer credit information under commercial speech doctrine); *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (subjecting use, disclosure, and access to customer proprietary network information to commercial speech review).

the integrity of the “informational function.”<sup>67</sup> By deploying a form of intermediate scrutiny analogous to *Central Hudson*, *Edwards* implicitly accepts this framework of analysis.

If this is an accurate interpretation of *Edwards*, the case should have addressed the fundamental question of whether the District’s licensing scheme materially reduced the flow of accurate information to the public. This is not an inquiry that *Edwards* ever considered.

#### IV. SPEECH AND CONSTITUTIONAL VALUES

Those interested in expanding First Amendment protections for what Sherman calls “occupational speech,” which includes the speech of professional tour guides, offer a very different framework of constitutional analysis. Sherman claims that the tour guide industry is constitutionally privileged because it is especially speech dependent.<sup>68</sup> The argument is evidently that “[w]hat tour guides do is talk for a living. . . . They’re just like stand-up comedians, journalists or novelists. And in this country, you don’t need a license from the government to be able to talk.”<sup>69</sup>

The premise of Sherman’s approach is essentially that speech *qua* speech, wherever it occurs, is subject to the full panoply of ordinary First Amendment protections.<sup>70</sup> By “speech,” Sherman apparently means communication through human language,<sup>71</sup> which is why he strongly believes that licensing professional tour guides “should be

<sup>67</sup> Such controls, in other words, potentially compromise democratic competence. See *supra* note 35.

<sup>68</sup> Sherman, *supra* note 26, at 194, 199; see Alan Blinder, *Lawsuit May Reshape Tourist Industry in History-Rich Savannah*, N.Y. TIMES, Dec. 20, 2014, <http://www.nytimes.com/2014/12/21/us/lawsuit-may-reshape-tourist-industry-in-history-rich-savannah.html>.

<sup>69</sup> Blinder, *supra* note 68 (quoting Robert Johnson, the Institute for Justice attorney behind the suit); see also Press Release, Inst. for Justice, U.S. Supreme Court Declines to Hear Tour-Guide Lawsuit (Feb. 23, 2015), <http://www.ij.org/nola-tours-release-2-23-15> [<http://perma.cc/AKS7-AM4F>] (“‘Tour guides are storytellers,’ explained Robert Everett Johnson, lead attorney in the Savannah case. ‘And in this country, you don’t need a license to tell a story.’”); *id.* (“‘The government has no more business protecting the public from unlicensed tour guides than it does protecting the public from unfunny stand-up comedians,’ said Matt Miller, managing attorney for the Institute for Justice Texas Office.”).

<sup>70</sup> Hence Sherman praises “the First Amendment’s uncompromising text, which contains no exemptions for commercial speech or occupational speech (or even lower-value speech like depictions of animal cruelty, violent video games, or lies about receiving military honors).” Sherman, *supra* note 26, at 200–01.

<sup>71</sup> Or perhaps Sherman means to employ a slightly more expansive definition of “speech” equivalent to what the Court has called the *Spence* test. See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam) (finding speech protection to apply when there was “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”). For a critique of the *Spence* test, see Post, *supra* note 59, at 1250–60.

treated just like any other content-defined category of speech.”<sup>72</sup> Sherman argues that “[b]ecause occupational speech is speech, not conduct, ordinary First Amendment principles counsel that the content-based regulation of occupational speech is subject to strict scrutiny.”<sup>73</sup>

The weakness of Sherman’s analysis is its failure to ask why we have a rule against content discrimination in the first place. Sherman has no account of why “ordinary First Amendment principles” assume the form that they do. In fact, First Amendment principles prohibit content discrimination in public discourse because every person has an equal right to participate in the formation of public opinion, regardless of what they have to say. The harsh rule against content discrimination expresses the fundamental equality of democratic citizenship.<sup>74</sup> But equality of democratic citizenship has little application to occupational speech, which by definition lies outside of public discourse.

Doctors cannot claim a right of political equality to give whatever opinion they choose to their patients, regardless of whether it is misleading or incompetent. If doctors can assert First Amendment rights to protect their speech to patients in the course of professional practice, it is because of the information that they convey to patients. That is why the state may require doctors to convey accurate and reliable information, which is the point of ordinary medical malpractice law.<sup>75</sup> The state cannot require persons to convey accurate and reliable information in the context of public discourse,<sup>76</sup> but it can and should in the context of occupational speech.

If Sherman believes that the “ordinary” rule against content discrimination should apply to occupational speech, he must also believe that every lawyer is entitled to say what she pleases to her client, regardless of professional standards and the rules of malpractice. Although Sherman may conclude that the state can in the end prohibit malpractice to protect clients from harm, his theory nevertheless requires him to affirm that courts should apply strict First Amendment scrutiny in *every* malpractice case.

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<sup>72</sup> Sherman, *supra* note 26, at 192.

<sup>73</sup> *Id.* at 191.

<sup>74</sup> See POST, *supra* note 38, at 66–68.

<sup>75</sup> We doubt that Sherman’s distinction between ex post and ex ante regulations can bear the weight placed upon it. See Sherman, *supra* note 26, at 196. Does Sherman mean to imply that states cannot license medical doctors, or prosecute persons for practicing medicine without a license? Does he mean to imply that legislation prohibiting the unauthorized practice of law is inconsistent with the First Amendment? Requiring that lawyers and doctors receive licenses before practicing medicine or law is precisely ex ante. This is analogous to the context of commercial speech, where the Court has explicitly approved the enactment of prior restraints. See *supra* note 27.

<sup>76</sup> See *supra* p. 171.

The stakes in this debate are not, as Sherman politely puts it, “abstract” or “academic” questions of First Amendment theory.<sup>77</sup> At issue is the distinction between the speech of those engaged in self-governance (public discourse) and the speech of those who are governed. Unless we can make a distinction of this kind, we cannot speak of democratic self-determination, because virtually all government regulations will, in one way or another, “burden”<sup>78</sup> speech, if by speech we mean the use of human language.

Virtually everything humans do requires the use of language. Tour guides communicate no more conspicuously than do lawyers, doctors, accountants, or anyone who files tax forms, drafts corporate contracts, or sells or advertises commercial products. Taken to its logical conclusion, extending First Amendment scrutiny to every marketplace speech act would create a First Amendment question every time a lawyer is sued for malpractice for an incompetent opinion; every time a product manufacturer is sued in strict liability for an inadequate warning; every time a commercial lease is legally required to contain certain specific terms; every time a particular contract is deemed criminal under the antitrust laws.

If speech is understood to mean human communication, it is literally everywhere. If the regulation of every speech act is a constitutional question, we must hand over our government to what Justice Scalia trenchantly calls a “black-robed supremacy.”<sup>79</sup> We must abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*.

Sherman seems to believe that we are compelled to accept this future because of the Court’s recent decision in *Holder v. Humanitarian Law Project*.<sup>80</sup> We should remark at the outset that *Humanitarian Law Project* is an extraordinarily obscure and perplexing decision. It says one thing, and it does another. It upholds speech restrictions primarily on the basis of deference to an Executive Branch affidavit.<sup>81</sup> This is the very opposite of “strict scrutiny,”<sup>82</sup> which, if it means

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<sup>77</sup> Sherman, *supra* note 26, at 200.

<sup>78</sup> *Id.* at 189.

<sup>79</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting).

<sup>80</sup> 130 S. Ct. 2705 (2010).

<sup>81</sup> *Id.* at 2724–26. The Court announced that it would not “defer to the Government’s reading of the First Amendment,” *id.* at 2727, but then promptly gave “significant weight” — which for all practical purposes meant determinative weight — to the “judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization . . . bolsters the terrorist activities of that organization,” *id.* at 2728.

<sup>82</sup> Sherman, *supra* note 26, at 190 n.47 (referencing the description, in *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014), of *Humanitarian Law Project* as strict scrutiny). If all Sherman means to claim by way of constitutional protection for occupational speech is that such speech can be criminally prohibited on the basis of a statute and an executive affidavit affirming the government’s belief that the statute deters some harm, the stakes in his claim seem rather small.

anything at all, must require the state to meet a serious burden of persuasion.<sup>83</sup>

Most importantly, *Humanitarian Law Project* goes out of its way to suggest that speech with the very same content, and potentially causing analogous harm to foreign affairs, could not be criminally punished were it to be communicated in a manner that is “independent” of a terrorist group rather than “in coordination with, or at the direction of, a foreign terrorist organization.”<sup>84</sup> Although *Humanitarian Law Project* refuses to exercise independent judicial review of harm in the context of national security and foreign affairs, it would be shocking if the Court were to exercise similar deference in the context of truly independent speech. No court would allow speakers to be thrown in jail *merely* for publishing independent pamphlets supporting Hamas, even if Hamas were a designated foreign terrorist organization, and even if the “political branches”<sup>85</sup> were adamant that speech supportive of Hamas provided the effective equivalent of material support for Hamas.<sup>86</sup>

If this analysis is correct, *Humanitarian Law Project* turns essentially on the contrast between independent speech and speech “in coordination with, or at the direction of, a foreign terrorist organization.” What is the constitutional relevance of this distinction?<sup>87</sup> It must be that *Humanitarian Law Project* imagines the former as public discourse and the latter as more closely analogous to the “occupational” speech that Sherman is concerned to defend. Whatever its self-proclaimed level of scrutiny, *Humanitarian Law Project* is inconsistent with the far more forceful constitutional protections that courts nor-

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<sup>83</sup> One of us was involved in the litigation of *Humanitarian Law Project* and has previously noted its anomalous fact deference. See Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT'L L. REV. 519, 528–31 (2011).

<sup>84</sup> 130 S. Ct. at 2722. There is a striking analogy to the distinction that the Court made almost forty years ago in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), in which the Court sharply distinguished independent political speech from political speech “controlled by or coordinated with [a] candidate and his campaign . . .” *Id.* at 46. The Court classified the latter as “contributions.” It explicitly concluded that the First Amendment more highly valued independent speech than speech coordinated with a candidate. See *id.* at 44. *Humanitarian Law Project* seems the inverse of *Buckley*: it imagines that speech “in coordination with, or at the direction of, a foreign terrorist organization” is equivalent to the contribution of a fungible sum of money to the group, and in that way an addition to the group’s resources.

<sup>85</sup> *Humanitarian Law Project*, 130 S. Ct. at 2728.

<sup>86</sup> Cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>87</sup> See *supra* note 84. In our discussion we bracket the consistency of this distinction with the Court’s prior First Amendment freedom of association jurisprudence. One of us has previously argued that the reasoning of *Humanitarian Law Project* is incompatible with the Court’s precedents. See Shanor, *supra* note 83, at 524–28; accord *Humanitarian Law Project*, 130 S. Ct. at 2732–33, 2736–38 (Breyer, J., dissenting) (asserting inconsistency).



mally apply to public discourse.<sup>88</sup> Contrary to Sherman's characterizations, therefore, *Humanitarian Law Project* actually reinscribes the very distinction between public discourse and other forms of speech that we have insisted is so fundamental to the architecture of First Amendment doctrine.<sup>89</sup>

It is frankly difficult to imagine a world without this distinction. What Sherman calls "ordinary" First Amendment doctrine creates a public space in which every person is entitled to his or her opinion. This is a space of political equality. But does anyone desire professional relationships to be constructed on this model? Does anyone believe that every Enron accountant is entitled to his or her opinion, regardless of generally accepted accounting practices? Does anyone believe that the world would be better if professionals were trustworthy only insofar as they were led to be so by market incentives? Justice White was seeking to avoid these consequences by his concurrence in *Lowe v. SEC*,<sup>90</sup> which is why his opinion has been so influential. But we are pointed precisely to this dystopia by Sherman's repudiation of *Lowe* and by the libertarian reasoning advanced in a decision like *Edwards*.

Our point, and it is fundamental, is that First Amendment doctrine is plural. There is no single structure of First Amendment doctrine. The principles that protect public discourse do not apply to commercial speech, or to professional speech, or to the speech of professional tour guides. Different kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protec-

<sup>88</sup> Consider also that *Humanitarian Law Project* explicitly withheld judgment about whether the statute at issue could constitutionally be applied to a domestic organization. 130 S. Ct. at 2730; accord *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 1000–01 (9th Cir. 2012) (declining to extend *Humanitarian Law Project* to speech coordinated with a designated domestic terrorist group). It is unclear what constitutional reasoning might support the distinction between domestic and foreign organizations. The only explanation we can conceive is that the Court believes that constitutional protections ought to apply differently to those who participate in domestic public discourse. Although many questions might be raised about how such logic can be maintained in an increasingly globalized world, it nevertheless emphasizes the close connection drawn by the Court between the strength of First Amendment rights and democratic self-government. See *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd mem.* 132 S. Ct. 1087 (2012). This connection may help to explain how *Humanitarian Law Project* may be reconciled with the many cases upholding rights of speech and association with regard to domestic terrorist groups such as the Communist Party. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Scales v. United States*, 367 U.S. 203 (1961); *De Jonge v. Oregon*, 299 U.S. 353 (1937); see also *Humanitarian Law Project*, 130 S. Ct. at 2732–33, 2736–38 (Breyer, J., dissenting) (asserting inconsistency between the majority opinion and the Communist Party cases).

<sup>89</sup> We do not argue, as Sherman mistakenly contends, that "the justices don't believe what they said" in *Humanitarian Law Project*. Sherman, *supra* note 26, at 194. Our conclusion is rather that the case simply does not mean what Sherman hopes it does.

<sup>90</sup> 472 U.S. 181, 227–36 (1985) (White, J., concurring).

tions appropriate to the value it embodies. Because speech is everywhere, Sherman's procrustean aspiration to subject all speech to a single set of rules can lead only to doctrinal chaos. Worse, it threatens to revive the long-lost world of *Lochner* and destroy the very democratic governance the First Amendment is designed to protect.